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No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

In framing the questions presented for review, the Petitioners include matters which are in dispute. For example, it is in dispute whether Plaintiff was on "active duty" status while participating in an "official Army drug experimentation program," and it is in dispute that an appealable partial final judgment was ever entered in favor of the United States. It is also disputed that Plaintiff is suing his "superior officers." We therefore feel constrained to restate the questions presented as follows:

1. Whether the Court of Appeals erred in reopening the law of the case as established in a previous appeal, when controlling authority had changed during the interim.

2. Whether the Court of Appeals erred by finding this Court's decision in *Chappell v. Wallace*, and its rationale, to be distinguishable from the unique facts alleged in the present case.

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The Westmoreland Case: A Broken West Point Tie, N.Y. Times, Feb. 24, 1985, §1, at 1, Col. 3 27

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BRIEF FOR THE RESPONDENT

STATUTES

The Petitioners have set forth only the statute creating jurisdiction in the United States District Court over FTCA claims. Additional relevant statutes are set forth below.

28 USC §2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 USC §2680 provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—. . . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

STATEMENT

There are some incorrect assertions in the Petitioners' statement, as well as certain alleged "facts" which are completely outside the record. Also, some important facts which make this case unique and set it apart from the usual *Feres* case have been omitted from the Petitioners' statement. We therefore supplement the statement as follows.

The eleventh circuit below mentioned some of the important facts in its opinion. (Pet. App. 2a-3a). The district court judge elaborated further in his most recent opinion. (Pet App. 22a-23a).

The plaintiff did not volunteer to participate in any drug testing. He was not a true "volunteer," nor was he under any orders, nor was he taking advantage of a military privilege, nor was he on his regular duty status at the time in question.

While he was a master sergeant in the U.S. Army, Plaintiff volunteered to participate in a program ostensibly for the testing and development of various gas masks and protective clothing to be used as a defense against chemical warfare attack. There was no compulsion but he was promised that letters of commendation would be put in his file and he was released from his regular duty status for approximately a month. At any time Plaintiff desired he could withdraw from the program and return to his

regular duties. There is no evidence as to his technical duty status during that month.[1]

Plaintiff was deliberately given false information about the program in order to extract his consent to volunteer. The real purpose of the program was to observe Plaintiff's "unwitting reaction" to LSD, which was secretly introduced into his bloodstream on four occasions by being mixed with his drinking water, while he carried out the charade of testing gas masks and clothing. Defendants intentionally withheld the true facts for the next eighteen years since it was an integral part of the program to have unwitting human subjects for experimental drug testing.

When Plaintiff unknowingly ingested this dangerous drug on four occasions in February 1958, he experienced severe reactions including hallucinations, but had no idea what was happening. Hallucinogenic drugs such as LSD were virtually unknown to the public in 1958. Eventually Plaintiff returned to his active duty at Fort Knox, Kentucky, but he continued to have recurrent episodes. He occasionally lapsed into periods of incoherency, sometimes marked by violence, and he had no recall of such events afterwards. On one occasion, he awoke from sleep late

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1. Petitioners argue in their brief (pp. 5, n. 4; 9; 17) that Plaintiff pleaded in his second amended complaint he was on active duty at the time in question and that "there is no real question that plaintiff's injuries were incurred incident to service." If the implication is that plaintiff has always admitted his active duty status during his month at the testing laboratories, then that is not correct. The second amended complaint alleges that plaintiff was released from his regular duties to participate in the program (J.A. 4, ¶3), and that the following month he "returned to active duty." (J.A. 5, ¶5. See also R. 103-104). Plaintiff's position before the fifth circuit in the first appeal in this case was that he had been released from his regular duties and that his claim does not arise from an activity incident to his military service. (Pet. App. 68a, 72a). Although the fifth circuit held that plaintiff's injuries were incurred incident to military service, we have always taken issue with that.

at night and, without reason, violently beat his wife and children later being unable to recall the event.

Plaintiff's inexplicable behavioral changes eventually resulted in the breakdown and dissolution of his marriage and family life. (Pet. App. 22a-23a, n. 2). He was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times he would be absent without leave and could not recall his whereabouts when questioned. Before the drug testing he had an unblemished record; he had earned various military honors and intended to pursue a promising military career.

In January of 1969, Plaintiff retired from the army. (R. 72, 104). In December of 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that he had been given LSD during February, 1958. (R. 50). The letter solicited his participation in a follow-up study of the "volunteers" who participated in the 1958 LSD experiments. Plaintiff filed administrative claims with the United States Army, which were denied with the statement that there was no appropriation available to pay such a claim and that if Plaintiff was dissatisfied he should file an action within six months in federal district court. (Pet. App. 70a, n. 5; R. 760-762). It was not suggested to Plaintiff that he should seek veterans benefits. Plaintiff thereafter filed this action in the district court in May, 1978. (Pet. App. 3a).

In the first appeal to the fifth circuit, the appellate court did not affirm an order dismissing the FTCA claims, as Petitioners state. Rather, the fifth circuit vacated a summary judgment on grounds that the district court had no subject matter jurisdiction to enter any judgment in favor of the government and, at most, it could only dismiss the FTCA claim, without prejudice, if the government was immune from suit. (Pet. App. 67a-95a).

Next the Petitioners state that, after remand from the first appeal, the district court entered a partial final judgment in favor of the United States on November 9, 1982, which was never appealed. That is not exactly what happened. The district court entered an interlocutory "order" directing the clerk to enter a partial final judgment in favor of the United States(Pet. App. 54a-55a), however the clerk never entered any final judgment on the civil docket. (See J.A. 2). There was therefore no final judgment from which to appeal, as discussed in more detail *infra*.

The eleventh circuit below, in the second appeal, held that a case-by-case analysis is required under *Chappell*[2] to determine whether a particular *Bivens*[3] suit would undermine military discipline *if* the facts of the case appear to fall outside the typical *Feres*[4] factual paradigm. The Petitioners' brief (at page 6) omits the last half of this statement.[5]

The petitioners repeatedly assert that plaintiff is suing his "superior officers" for constitutional violations, which is prohibited by the *Chappell* decision. That is not correct. In fact, not one of the named defendants is alleged to be (nor has any been shown to be) a superior military officer. The evidence in this case (if Plaintiff is allowed to present it) will show that the individual defendants are civilian personnel. (At least that is true according to our informa-

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2. *Chappell v. Wallace*, 462 U.S. 296 (1983).

3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

4. *Feres v. United States*, 340 U.S. 135 (1950).

5. As the eleventh circuit also stated in *Cole v. United States*, 755 F.2d 873, 877, n. 11 (11th Cir. 1985), "We do not imply that such a case-by-case analysis is required in all cases."

tion and belief. We have not heard otherwise from any individual defendant.) Some are doctors, others are employed in civilian agencies of the federal government (such as the CIA), and a state university has also been named. Other possible defendants have not yet been discovered and named.

These defendants have different degrees and types of involvement in the 1958 drug experimentation program. Their relationship to each other and to the plaintiff is not yet developed by the record since this case is still at the pleading stage without an answer to the complaint having yet been filed. The record does not show any of the defendants to be "superior officers" in the disciplinary or military context discussed in this court's opinion in *Chappell*.

There is nothing in the record in this case to explain how the LSD testing supposedly related to plaintiff's military service, which is pertinent to the *Feres* and *Chappell* analysis. Because of this omission in the record the Petitioners are now, for the first time in this litigation, citing sources outside the record to explain the nexus between Plaintiff's military service and the use of his mind and body for covert LSD experimentation.

At footnote 1 on pages 2-3 of their brief the Petitioners cite a Congressional report for a statement that the purpose of the LSD experimentation on soldiers was to ascertain how the drug affects their ability to function as soldiers and maintain security. The Petitioners again cite the same report at page 26 of their brief to support their contention that "It is absolutely clear that the LSD testing program at issue was an official Army program." The Petitioners also cite (at p. 28, n. 19) another report, out-

side the record in this case, to show that they only believed the effects of the LSD would be temporary.

We have not been able to verify these non-record facts from available sources. We have been advised by the government printing office they are out of print. Use of such non-record facts in this case cannot be justified as a Brandeis brief technique since it only constitutes a selected Congressional report, in a case that does not involve the reasonableness of legislation, and it is not a "public fact" within the scope of judicial notice. *Muller v. Oregon*, 208 U.S. 412 (1908); *Melong v. Miscronesian Claims Comm'n*, 643 F.2d 10, 12, n. 5 (D.C. Cir. 1980); *Eagle-Picher Ind., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 22, n. 8 (1st Cir. 1982). Moreover, the use of such a non-record report to establish the adjudicative facts of this case is inappropriate because the subject matter (how the LSD testing related to plaintiff's military service) is subject to "reasonable dispute." F.R.Ev. 201 (b). In fact, it conflicts with congressional documents which have been filed by Plaintiff in this case with the district court.

In October of 1978, Plaintiff filed with the district court several documents and reports including a publication entitled, Human Drug Testing by the CIA, 1977, Hearings Before the Subcommittee on Health and Scientific Research of the Committee on Human Resources, S. Doc. No. 1893, 95th Cong., 1st Sess. (Sept. 20-21, 1977). (R. 140).[6]

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6. Some of these documents are also described at R. 73-74, 140, and 141-146. According to R. 140, these exhibits were placed in a separate brown envelope by the district court clerk when the first record on appeal was prepared in 1980. We are advised by the eleventh circuit that the envelope is no longer with the record and cannot be located. The district court clerk's docket sheet indicates these exhibits were sent to the fifth circuit at the time of the first appeal but may not have been re-

(Continued on following page)

According to these Senate committee hearings there is reason to believe the human drug experimentation programs during the late 1950's transcended the involvement of the military and was more than just "an official army program." (Pet. brief at pp. 26, 28).

As summarized in Senator Kennedy's opening statement:

> ". . . individual Americans from all social levels, high and low, were made the unwitting subjects of drug tests; scores of universities were used to further CIA research objectives without their knowledge, thus threatening in a fundamental way their traditional independence and integrity; other Government agencies such as the Bureau of Narcotics, the National Institutes of Health and the Internal Revenue Service, were used to further the programs and mission of the Central Intelligence Agency." *Id.* at 1.

There was testimony and other evidence presented at the hearings showing how the CIA used the military as a conduit for funding LSD testing to outside contractors. *Id.* at 131, 151, 156. The evidence at the hearings included a memorandum of the general counsel of the Department of Defense entitled, "Experimentation Programs Conducted by the Department of Defense that Had CIA Sponsorship or Participation and that Involved the Administration to Human Subjects of Drugs Intended for Mind-Control or Behavior-Modification Purposes." *Id.* at 157. It describes how the Department of Defense participation was limited

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Footnote continued—

turned with the rest of the file when the case was remanded back to the district court in 1981. (See Appendix to this brief). We have one copy of the Human Drug Testing by the CIA, 1977 publication (also now out of print) which can be furnished to the court if it is desired.

in some of the programs "to channeling funds to outside contractors in order that sponsorship of the Central Intelligence Agency be covered." *Id.* It described how the project codified as "MKULTRA" was "planned, directed and controlled by the Central Intelligence Agency" . . . "but which might have had some Department of Defense involvement." *Id.* at 158. The drug testing at Edgewood Arsenal was one of several programs in which there was some military participation. *Id.* at 153.

It was alleged by Plaintiff that there is evidence the CIA was involved in the testing program at Edgewood Arsenal. (R. 142-143). The standard procedure of "MKULTRA" was to covertly administer the program through other federal agencies. (R. 143). In 1973, MKULTRA records were destroyed by CIA personnel acting on the verbal orders of Dr. Sidney Gottleib (program chief for MKULTRA) and Richard Helms, director of the CIA. (R. 143).

Contrary to the alleged military purpose of the drug testing set forth in petitioners' brief, there was evidence at the hearings that the purpose of the MKULTRA project was "to investigate whether and how it was possible to modify an individual's behavior by covert means." *Id.* at 169.[7] The Bureau of Narcotics was also interested in determining whether chemical materials could be used to elicit information from drug informants. *Id.* at 171.

Also, contrary to the assertion that the drug experimentation going on in the late 1950's was confined to being "an official Army program," evidence presented at the hearings revealed that the victims of covert drug experi-

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7. That statement was made by Dr. Sidney Gottlieb, a former CIA agent who is one of the named defendants in this litigation. See also *Id.* at 158.

ments by the CIA were not limited to military servicemen. There was testimony that the CIA experimented with different methods of delivering LSD to unsuspecting civilians. This included sending CIA employed psychologists to bars and taverns to meet and drink with people, and determine if LSD can be surreptitiously delivered by using an aerosol spray. *Id.* at 100.

Finally, Petitioners state several times in their brief that even the Plaintiff's complaint alleges the drug testing program to be an official Army program. (Pet. brief at 28, 17, 5). We disagree. What the complaint alleges is that "the defendants, federal executive department officials and agents, who were *acting under color* of a covert federal army program. . . implemented by the United States government . . ." (J.A. 7, ¶4). The persons involved in the program were acting under the color of what was supposed to be an army program to test gas masks and protective clothing. That is not inconsistent with the allegations that Plaintiff was deceived as to the nature of the experiments, which were implemented by non-military defendants including the Central Intelligence Agency and the University of Maryland.[8] The second amended complaint alleges that the program was carried out by a contract between the University of Maryland and one or more unknown federal agencies. (J.A. 9, ¶20).

Because this case, despite being nine years old, has never passed the pleading stage (no answer having yet been filed by any defendant), there has been virtually no pretrial discovery as to the hierarchy involved in the drug

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8. The second amended complaint names as defendants, in addition to the physicians and the University of Maryland, the former director of the CIA, Richard Helms. The original complaint also named the Central Intelligence Agency and the Department of Defense. (Pet. App. 67a, n. 1).

testing program at Edgewood Arsenal. Plaintiff has had to make due so far with the limited discovery permitted by the district court going solely to the *Feres* issue. (R. 101, 402, 806, 1291-1292, 1334).

SUMMARY OF ARGUMENT

I.

The court of appeals did not lack jurisdiction over the Plaintiff's FTCA claim. No final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter it. A separate appealable judgment was not entered by the clerk pursuant to the rules of civil and appellate procedure.

Besides, the district court had no jurisdiction to enter a judgment in favor of the government if it was immune from suit, and subject matter jurisdiction is not waivable. Even if a final judgment had been entered, there are now grounds for relief from that judgment by motion in the district court pursuant to the eleventh circuit's directions. The modification of the "law of the case" by the eleventh circuit did not go beyond the issues involved in the interlocutory appeal before the court.

II.

A. Because the Plaintiff's claim is not the type that would require judicial involvement in sensitive military affairs at the expense of military discipline, the court of appeals was correct in holding that Plaintiff's FTCA claim is not necessarily barred by the *Feres* doctrine. Recent developments in the decisional law from this court and from several circuit courts of appeals demonstrate that the *Feres* doctrine should bar an FTCA action only when

its primary rationale is implicated. A mechanical application of the *Feres* doctrine in a case where the facts fall outside the rationale of *Feres*, would reduce American servicemen to a worse position than incarcerated federal prisoners who are allowed to sue the government under the FTCA and the responsible individuals under a *Bivens* action for violation of constitutional rights.

Although the civil courts are justified in generally deferring to intra-military procedures to resolve most cases of isolated misconduct by military servicemen, civilian courts are a more institutionally competent forum for certain claims in which widespread and egregious misconduct is alleged which would cause embarrassment to the military, and in which important societal norms are to be vindicated.

In this case the Plaintiff was not on his regular active duty status while at Edgewood Arsenal during the testing program. He had been released from his duty status at Fort Knox and he was free to stay at Edgewood Arsenal for the testing or to leave at any time he wanted and return to his duties at Fort Knox. There is no evidence of any disciplinary relationship between Plaintiff and anyone else at the testing facility. There is also no evidence in the record of how the LSD testing supposedly related to Plaintiff's military service. There *is* evidence suggesting that the drug experimentation program was sponsored or controlled by other non-military federal agencies and was intended to test methods of mind control and behavior modification. This is far attenuated from Plaintiff's military service.

This case does not involve any questioning of military orders and does not implicate military discipline. Plaintiff was not a "volunteer" for drug testing. This case does

not require a court to second-guess the wisdom of military decisions. The Army itself has already admitted its own error in the Inspector General's report. The facts of this case demonstrate a patent violation of the Nuremberg Code prohibiting involuntary human experimentation of this nature. The circumstances of this case do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review.

Since the defendants are not members of the armed forces nor civilian employees engaged in activities usually associated with the armed forces (the typical *Feres* factual paradigm), the lower courts were correct in considering that the rationale of the *Feres* doctrine is not implicated by the facts of this case.

B.

The court of appeals did not err by holding that Plaintiff's *Bivens* claim is not barred by *Chappell,* and by noting how the "special factors" present in *Chappell* are not present in this case.

The *Chappell* case involved superior military officers on board plaintiff's navy combat vessel who were being sued for making certain command decisions which were alleged to be racially motivated. There is a world of difference between those allegations and the facts in the present case. This Court's holding in *Chappell* was expressly *not* intended to prohibit *all* civil claims by military servicemen for constitutional wrongs they suffer in the course of military service.

The circuit courts are in conflict on the proper interpretation of *Chappell* but the majority have ruled, consistent with the eleventh circuit below, that it was not

meant to be as pervasive as the government argues. The third circuit is in conflict but the eighth circuit and ninth circuit are in accord with the eleventh circuit in this case.

The rule advocated by petitioners in a case of this nature would do more to promote corruption in the military than to promote discipline.

Veterans benefits would not compensate plaintiff for the type of injury he has suffered. Veterans benefits do not purport to compensate for depriving citizens of their most fundamental constitutional rights and for destroying a man's life and inflicting mental anguish. VA benefits do not serve the important deterrent purpose behind a *Bivens* action to discourage such abuse of power by civilian officers and agents of the federal government. The nature of the acts involved in this case deserve to be affirmatively deterred.

Also, the Petitioners' concealment of the true facts for eighteen years (and for seven years after Plaintiff's retirement from the Army) has substantially prejudiced Plaintiff's ability to show a "service connection" of his disability to the 1958 LSD experiments, to satisfy VA regulations. The Army Claims Service denied Plaintiff's claim, in part, because it rejected the alleged connection with military service.

The intra-service remedies in *Chappell* were found to be adequate by this Court and other special factors existed in *Chappell* which do not exist here. Unlike the plaintiffs in *Chappell,* Mr. Stanley is not just claiming the Army cheated him out of money or a promotion. The intra-service remedy, if not equally as effective as a *Bivens* action, must at least "provide meaningful remedies" before it rises to the level of becoming an important "special

factor." There is no basis for reading into the Veterans Benefits Act an exclusive remedy provision which Congress left out.

The individual defendants are entitled, of course, to raise a qualified immunity defense if they acted in good faith and reasonably believed their conduct to be lawful.

The eleventh circuit below employed the same functional approach to immunity law which this court sanctioned in an opinion written the same day as the *Chappell* opinion.

ARGUMENT

I. The Court of Appeals Did Not Lack Jurisdiction Over the Plaintiff's FTCA Claim.

As mentioned earlier, no final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter it, nor was any notice of entry of judgment mailed by the clerk to the parties pursuant to Rule 77 (d).

Under F.R.C.P. 54 (b), the district court may "direct the entry of a final judgment" as to fewer than all of the parties by making "an express direction for the entry of judgment" to the clerk. Here, the district court "ordered that the clerk enter final judgment in favor of the United States." (Pet. App. 54a-55a). However, that "order" is not self executing and is not appealable. (From its own language, the order was obviously not intended to be self executing.)

F.R.A.P. 4 (a)(6) provides that a judgment is "entered," for appeal purposes, when it is entered in com-

pliance with Rules 58 and 79 (a) of the F.R.C.P. Rules 58 and 79 (a) require the clerk to "enter" the judgment, as a separate document, on the civil docket, and provide that it shall only be effective when that has been accomplished. See also Form 32, appended to the F.R.C.P. The federal courts have repeatedly noted that until the clerk enters a separate judgment on the civil docket pursuant to Rules 58 and 79 (a), the appeal time does not begin to run. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683 (4th Cir. 1978); *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977).

Petitioners state that the clerk entered the court's *order* on the docket pursuant to Rule 79 (a), however Rule 58 and the case law specifically require that "every judgment shall be set forth on a separate document" (the form of which must be approved by the court) and "a judgment is effective only when so set forth and when entered as provided in Rule 79 (a)." Petitioners refer to this as being "hyper-technical" (Pet. brief at 13) but the rules clearly provide for it for the reasons explained in the advisory committee notes on the 1963 amendment to Rule 58. The requirement that there be a judgment set out and entered as a separate document from the court's memorandum order directing the Clerk to enter it was intended to eliminate uncertainty as to the time for appeal.[9]

Even if the clerk had followed through and entered a separate final judgment on the civil docket, it still would not foreclose a later inquiry in the partial final judgment

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9. The eleventh circuit below incorrectly referred to a "final judgment" having been entered on the FTCA claim rather than an "authorization for final judgment" which would have been more accurate. (Pet. App. 5a). However, the eleventh circuit correctly treated it as an "order."

for several reasons. First, the district court had no subject matter jurisdiction to enter a partial final judgment for the United States on grounds of sovereign immunity. At most, all it could do was dismiss the action without prejudice for the reasons explained in *Stanley v. Central Intelligence Agency,* 639 F.2d 1146 (5th Cir. 1981). As the fifth circuit stated in the first appeal in this case, *Stanley, supra;* the only correct disposition of a case based on *Feres* is a dismissal for lack of jurisdiction since the government is immune from the court's jurisdiction. (Pet. App. 86a-95a). Thus, the district court had no jurisdiction to enter a partial final judgment based on *Feres,* and a lack of subject matter jurisdiction can be raised at any time in the litigation. It cannot be waived by any party's action or inaction. F.R.C.P. 12 (h); *Kain v. Winslow Mfg., Inc.,* 736 F.2d 606 (10th Cir. 1984); *Eagerton v. Valuations, Inc.,* 698 F.2d 1115 (11th Cir. 1983).

Second, even if there had been a final judgment entered which was not appealed, Plaintiff would now certainly have a viable motion for relief from that judgment under Rule 60 (b), for reasons number (4), (5) and (6) listed under that rule. The eleventh circuit's opinion in this case could be construed to simply provide support for a Rule 60 motion for relief from judgment when the case returns to the district court on remand.

Petitioners also argue that the eleventh circuit lacked jurisdiction to reopen the FTCA claim when it went beyond the issues involved in the interlocutory appeal before the court, dealing with the *Bivens* claim. However, the issues involved in the *Bivens* claim and the alleged immunity of the individual defendants closely parallels the government's immunity due to the *Feres* doctrine when the government is sued under the FTCA. In the inter-

locutory appeal the individual defendants argued entirely on the basis of the *Feres* doctrine and how its rationale should also be applied to *Bivens* actions to make them all immune from this lawsuit. It was not improper for the eleventh circuit to reconsider the application of the *Feres* doctrine to this case, since that is what all parties were arguing about in the interlocutory appeal. While it impacted on an earlier order, it also impacted directly on the order involved in the interlocutory appeal.

The assertion that the United States' interests were not represented by anyone in the eleventh circuit should ring hollow. The United States has been, and still is, represented by the Department of Justice which filed briefs with the eleventh circuit. The Department of Justice also represents the individual federal defendants. Even after the United States was dismissed by the district court's interlocutory order, the United States was still filing (by and through the Department of Justice) its "suggestion of interest" in the continuing litigation pursuant to 28 USC §517 and 28 C.F.R. §50.15. (R. 1281-1283). The Department of Justice has ably represented the interests of all the federal defendants, including the government, throughout this litigation.

Apart from these procedural issues, petitioners do not seem to challenge the eleventh circuit's discussion of how an appellate court that has once created the "law of the case" can reopen the issue in a later appeal when controlling authority has changed in the interim or manifest injustice would otherwise result. See also *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Yamamoto v. Omiya*, 564 F.2d 1319 (9th Cir. 1977); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659 (5th Cir. 1974).

II. Because the Plaintiff's Claim Is Not the Type That Would Require Judicial Involvement in Sensitive Military Affairs at the Expense of Military Discipline:

A. The Court of Appeals Did Not Err by Holding That Plaintiff's FTCA Claim Is Not Necessarily Barred by the Feres Doctrine.

Recent developments in the decisional law demonstrate that the *Feres* doctrine should bar an FTCA action only when its primary rationale is implicated. In 1981 when this case went up on appeal for the first time, the fifth circuit focused on the plaintiff's having "volunteered" for the program and cited a string of "volunteer" cases (Pet. App. 72a-73a); but overlooked the fact that plaintiff was not a true volunteer because his consent had been fraudulently extracted. The fifth circuit also expressed reliance on the fact that the drug experiments occurred on a military base. (Pet. App. 75a). Since that time, this Court has discounted the importance of that one fact.

In *United States v. Shearer*, 473 U.S. ....., 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) this Court noted that *Feres* seems best explained by the military discipline rationale, and that other rationales sometimes advanced in the past to support the *Feres* doctrine are "no longer controlling." *Shearer*, 105 S.Ct. 3043, n. 4. This Court stated, "the situs of the [incident] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions." *Id.* at 105 S.Ct. 3043.

An activity should be deemed "incident to military service" only when the policy factors that support the *Feres* doctrine are applicable to the facts. As this Court stated in *Shearer*, "[t]he *Feres* doctrine cannot be reduced

to a few bright-line rules; each case must be examined. . ." That language suggests it is the underlying reason for the *Feres* doctrine which must control its application to any given set of facts. A judicially created exception to a remedial act of Congress should have a substantial reason to support it, and should only be applied when that substantial reason is implicated. The *Feres* bar should be erected only in those cases which would involve the judiciary in sensitive military affairs at the expense of military discipline.

A mechanical application of the *Feres* doctrine, in a case where the facts fall outside the rationale of *Feres*, would reduce American servicemen to an even worse position than federal prisoners who are permitted to sue the government under the FTCA for negligence of prison officials. *United States v. Muniz*, 374 U.S. 150 (1963).

It took about three decades for this Court and the lower federal courts to finally begin to place realistic limitations on the *Feres* doctrine. Until then, the doctrine was grudgingly followed by the federal courts but it was so widely criticized over the years that it was commonly referred to as the "much-maligned *Feres* doctrine." This Court is undoubtedly aware there is presently a strong contingent in Congress with plans to modify the doctrine (at least in the area of medical malpractice).

As a result of the shift in methodology that has occurred, the courts within the past several years (both before and after this Court's opinion in *Shearer, supra*) have taken a fresh approach to these cases and have declined to apply the *Feres* doctrine as a bar except when the litigation would likely involve the judiciary in sensitive military affairs at the expense of military discipline. In

addition to the decision of the eleventh circuit in the present case, see also *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986); *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985); *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983); *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated en banc 779 F.2d 1492 (1986), cert. granted (October 6, 1986, Case No. 85-2039); *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 105 S.Ct. 3524 (1985); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Cooper v. Perkiomen Airways, Ltd.*, 609 F.Supp. 969 (E.D. Pa. 1985).

Implicit in the only rationale for the *Feres* doctrine that has survived the scrutiny of time (the avoidance of having the civil courts intervene into sensitive military issues and second-guess military orders) is the belief that military courts and intra-military procedures can perform the public tort law functions of compensation and deterrence, while protecting the military's interest in maintaining discipline, better than the civil courts can. Petitioners essentially argue this when they maintain that the civil courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." (Pet. brief at 21). Even if one believes this is true in the abstract, there are surely exceptions to that rule, of which this case is illustrative.

Public tort law is a system of rights and remedies for citizens who have been harmed by the activity of government officials. Congress' enactment of the FTCA was an acknowledgment of its confidence in the public tort system. A civilian court's deference to intra-military procedures on the ground that the military knows more

about the requirements of discipline reflects a view which we do not criticize in the abstract. However, civilian courts are a more legitimate and institutionally competent forum for certain claims in which important societal norms are to be vindicated.

The military justice system is certainly competent to punish and deter isolated misconduct of lower level officers that departs from the military's own norms of behavior. No one doubts the military's zeal to deter conduct deviating from its own norms. However, it has been noted by legal scholars that the intra-military remedial system cannot be relied on to play a watchdog role when it may cause embarrassment to the military. It is naive to overlook the temptation for the military to cover up its own embarrassing wrongdoing on a grand scale. See *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 Yale L.J. 992, 999 (1986). It has not been unknown for high-ranking officers to exert influence over intra-military investigations into their own misconduct to limit the potential for embarrassment. See *For Admiral, Warning; For G.I.'s, Jail*, N.Y. Times, Feb. 16, 1985, §1, at 5, Col. 3.[10]

Recent events have again underscored the occasional misuse of military channels by federal civilian agencies. There is a strong public interest in having a military establishment that is not entirely monolithic and autocratic. Due to internal, institutional pressures to conform or exhibit loyalty in the military, cases involving particularly

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10. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.")

egregious or widespread military misconduct are more appropriately resolved by the civilian courts.[11]

The judges that have reviewed this case have found the misconduct involved to be unique and particularly egregious. The district judge (a nine year veteran on the federal court and a state trial judge for fourteen years before that) stated: "This court has seen few cases which more desperately cry out for and demand judicial redress." (Pet. App. 51a). This case presents shades of an Orwellian novel where even one's own creative thought process is altered and controlled by the government. The district judge noted: "The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity." (Pet. App. 51a). "The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States." (Pet. App. 65a). Obviously, this is not a garden variety *Feres* or *Chappell* type case, and it is not likely to be a recurring fact pattern.

For that reason, the petitioners exaggerate when they argue in their brief (at p. 21) that if this case is allowed to go forward there will be no basis to stop other soldiers from going to court to challenge the way they have been treated by military superiors. We certainly do not advo-

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11. At page 2, n. 1 in their brief, the petitioners admit that plaintiff was only one of about 1,000 unwitting soldiers who were covertly drugged with LSD between 1955 and 1958. The statute of limitations will have run on those who, along with the plaintiff, were notified in 1975 but did not timely file suit. However, to deny this plaintiff (who did timely file suit) redress in the civil courts for this type of egregious and widespread misconduct would be to abdicate the civil courts' traditional role to vindicate the violation of important societal norms.

cate an open door policy for every soldier who challenges his or her treatment by military superiors to litigate such grievences in the civil courts. However, the facts of this case are unique and are not inherently military in nature. They are not unlike the claim a civilian would have against a CIA agent who covertly introduced LSD into his bloodstream in a tavern one night by use of an aerosol spray.[12]

The facts of this case are distinguishable from the other *Feres* or *Chappell* type of cases that have been before this Court. The plaintiff here was not on his regular active duty status while at Edgewood Arsenal during the testing program. The eleventh circuit noted this in its opinion. (Pet. App. 12a). Plaintiff was released from his duty status at Fort Knox, and while at Edgewood Arsenal, he had complete control over his movements (when he was not drugged). At any time, he could withdraw from the program and return to Fort Knox. There is no evidence as to any disciplinary relationship between plaintiff and anyone else at the testing laboratories. There is no evidence as to his technical duty status during that month. There is also no evidence in the record of how the LSD testing supposedly related to plaintiff's military service. There are documents in the record suggesting the possibility that these drug experimentation programs were sponsored or controlled by other non-military federal executive agencies and were intended for mind control or behavior modification purposes.[13]

This case is unlike the cases relied on by the Petitioners. There is no questioning of direct military orders

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12. Human Drug Testing by the CIA, 1977, *supra* at 100.

13. The mission of the army is to preserve peace and security, provide for the defense, support and implement national policies and objectives, and to overcome other aggressive nations. 10 USC §3062.

involved here (unlike the atomic testing cases), no threatened effect on performance of military duty or discipline, no facts involving the special nature of military life, the Plaintiff was not availing himself of one of the benefits of military service when the incident occurred (unlike the cases involving medical negligence by military doctors during the course of rendering free medical care to servicemen), nor is this case similar to the typical "volunteer" cases since Plaintiff never gave an informed consent to any drug experimentation.

Nor does this case require a civilian court to second-guess the wisdom of military decisions.[14] The petitioners argue (at p. 9 in their brief) that a central issue in plaintiff's case would be whether the army erred by covertly administering LSD to soldiers in the 1950's (and also by failing to debrief them when they returned to active duty, and even failing to debrief them when they were discharged to civilian life years later). There is no question the army erred and that point is so clear that it does not at all involve the judiciary in sensitive military matters. The army itself has already made the conclusion in the Inspector General's report that the drug experiments were unauthorized by existing army regulations. (See R. 145 and I.G. report at 41, 45-46, 49-50, 116).

The allegations here (which the government admits) raise a case of patent illegality and violation of the Nurem-

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14. This is so even assuming there were military decisions involved in this case. Whether there was any military decision-making or whether the testing program was controlled instead by another civilian governmental agency is not apparent from the record. As shown by the documents filed by the plaintiff which discuss many similar drug testing programs during this ignominious period in our nation's history, this would not be the first time the CIA or other civilian government agency used the military as a conduit to channel funds for a non-military purpose.

berg Code, not just a question of the wisdom of military decision-making. Involuntary human experimentation of this nature has been condemned and declared illegal by every pertinent statute and regulation of the United States and by international standards. See *United States v. Karl Brant, et al.*, 2 Trials of War Criminals Before Nuremberg Military Tribunals, 181, 182 (1949). The Nuremberg Code has been adopted by the AMA and by the Chief of Staff and the Secretary of the Army, Navy and Air Force. (See R. 74, 144). Under the Nuremberg Code the actions alleged (and admitted by the government) to have occurred here give rise to criminal liability despite the defenses of "military necessity" or "obedience to superior orders." See *United States v. Karl Brant, supra* at 1-12, 174-184.

Besides, just because a case may involve the issue of whether the army erred does not mean it necessarily involves an issue too sensitive for the civil courts to consider. Otherwise, the only forum that could ever decide if the army erred would be the army. As mentioned earlier, while the military justice system is highly competent to punish and deter isolated misconduct deviating from its own norms of behavior, the civil courts are more institutionally competent to resolve cases involving particularly egregious or widespread military misconduct. In such cases the civil courts will command greater public confidence.

Also, just because one officer may have to testify against another should not be the litmus test in determining whether a particular case "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer, supra* at 105 S.Ct. 3044. Such a test would eliminate every conceivable claim in which the military is even peripherally involved.

The interest in not having one officer testify as to another officer's actions has not been deemed strong enough to foreclose haling military officers into court when the plaintiff is someone other than an intra-military tort victim. For example, General William Westmoreland's recent multimillion dollar defamation suit against CBS brought high-ranking military officials into court to testify on both sides as to decisions and actions that were highly sensitive. See e.g. *Jury Told of Order to Cut Troop Count,* N.Y. Times, Feb. 12, 1985 at B6, Col. 4. Indeed, General Westmoreland claimed to have settled the case because he was disheartened that a colleague, Major General Joseph McChristian, had testified against him. *The Westmoreland Case: A Broken West Point Tie,* N.Y. Times, Feb. 24, 1985, §1, at 1, Col. 3. See also *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (adjutant general of Ohio and subordinate officers not immune from damage suits arising out of Kent State shooting).

Civilian plaintiffs are not barred from suing for injuries caused by the tortious conduct of the military.[15] In cases involving civilian plaintiffs, the extent of factual inquiries into military affairs is not substantially less than in cases involving military plaintiffs. The fact that a military official may have to testify is not, by itself, an overpowering justification for barring all claims by military plaintiffs in all cases. That should not be the basis to determine whether the particular case would involve the judiciary in sensitive military affairs at the expense of military discipline.

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15. The language of the FTCA makes explicit that Congress contemplated suits against the military, but created exceptions to liability for claims "arising out of the combatant activities of the military . . . during time of war." 28 USC §2680 (j) (1982).

Even if the plaintiff's activity at the testing laboratories is deemed incident to his military service, the reasoning of the eleventh circuit in *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), approved en banc 779 F.2d 1492 (1986), is sound and should be approved. If (as in the present case) the alleged tortfeasor is not a member of the armed forces nor a civilian employee engaged in activities usually associated with the armed forces (the typical *Feres* factual paradigm), *then* the court should consider the rationale supporting the *Feres* doctrine to determine to what extent, if any, the allowance of the suit would circumvent the purpose of the doctrine. (LSD experimentation is not an activity usually associated with the armed forces.)[16]

Petitioners argue (Pet. Br. at 18) that even if this Court agrees with *Johnson, supra,* the eleventh circuit has "far extended *Johnson* in this case." To the contrary, although it is our view that *Johnson* was correctly decided, this case is even more compelling than *Johnson* and would make for a narrower holding. This is so for several reasons.

First, this case raises questions about plaintiff's duty status, unlike *Johnson.* The injury here did not occur during the course of a military rescue operation as in *Johnson,* but rather, under circumstances far more attenuated from military service. It is notable that the district judge who dismissed the *Johnson* case was the same judge who refused to dismiss this case.

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16. Petitioners state in their brief (p. 18) that this case falls within the typical *Feres* factual paradigm "since Stanley alleges that his injuries were caused by Army officers and other employees (or contractors) of the Army." That is not accurate. The plaintiff's complaint does not make those allegations. (See J.A. 3-10, especially ¶s 14, 16, and 20).

Second, *Johnson* will govern all incidents of military air accidents in which FAA or other non-military personnel may arguably be negligent. That is obviously a fact pattern capable of recurring. We do not believe the facts of *this* case will ever again occur in this country (unless such conduct is not deterred).

Third, the plaintiff in *Johnson* received a full range of veterans benefits before bringing the FTCA action, however in this case administrative benefits are not available to compensate the plaintiff for the injury done to him. (Discussed further, *infra*).

This Court has not prevously considered (until the *Johnson* case which is now pending before this Court) whether *Feres* bars a serviceman's action for injury caused by the negligence of an employee of a civilian agency of the government. The rationale of *Johnson* and similar recent decisions from other circuit courts should be reaffirmed, as it was implicitly in *Shearer, supra*. In those cases where the prosecution of the claim would not compromise the military disciplinary structure nor otherwise encroach upon the rationale of the *Feres* doctrine, there is no sound reason for barring the action.

B. The Court of Appeals Did Not Err by Holding That Plaintiff's Bivens Claim Is Not Barred by Chappell.

If this Court finds that the *Feres* doctrine does not bar plaintiff's FTCA action against the United States, then this point would not require extensive discussion since it would logically follow that there would not be such an array of special factors as to preclude the *Bivens* claim against the individual defendants. However, even if the *Feres* doctrine does apply here to preclude the FTCA claim against the

United States, the eleventh circuit was correct in finding that it would not necessarily preclude the *Bivens* action against the responsible individual federal defendants, who are not superior military officers. The eleventh circuit carefully distinguished this case from *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362 (1983), by noting how the "special factors" present in *Chappell* are not present in this case.

In *Chappell, supra,* the defendants were all clearly "superior officers" (unlike the present case) consisting of the commanding officer and other officers on a navy combat vessel, who were being sued by enlisted navy men aboard the vessel. The Plaintiffs in *Chappell* claimed that because of their minority race the officers on board failed to assign them to desirable duties and gave them low performance evaluations, thus impeding their advancement in the navy. There is a world of difference between those allegations, which clearly involve command decisions affecting the Plaintiffs, and the allegations in the present case. This Court's holding in *Chappell* was premised on the need for knee-jerk reflex obedience to orders from superior military officers, and the disruption *in that type of case* that might result "if the soldier were allowed to hale his superiors into court."

The Petitioners rely on this Court's seemingly broad statement in *Chappell;* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." (103 S.Ct. at 2368). However, in context, this Court did not say it was creating a "per se" prohibition on all *Bivens* actions whenever the *Feres* doctrine would preclude an FTCA suit against the government. In fact, this Court noted it was dealing with a nonstatutory, constitutional

remedy rather than Congress' intent behind the FTCA, and this Court stated: ". . . The Court's analysis in *Feres* 'guides' [not 'controls'] our analysis in this case." *Id.* at 2365. This Court specifically cautioned that its decision should not be read to mean that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. *Id.* at 2367.[17]

Even if the *Feres* doctrine does preclude an FTCA claim in the present case, the rationale behind the *Bivens* case should not be overlooked. A *Bivens* action is a judicially-created, federal common-law remedy, implied directly from the constitution, and designed to fill a statutory gap where Congress has failed to create adequate statutory remedies for violations of constitutional rights. This Court in the *Bivens* case actually appears to have gone against the implied will of Congress since the remedy it created (damages for intentional torts committed by law enforcement officials) was at that time explicitly precluded under the FTCA. 28 USC §2680 (h) (1970) (amended by Pub.L.No. 95-253, 88 Stat. 50 (1974)). Indeed, the history of public tort law in America has been a story of "extraordinary judicial creativity and chronic legislative neglect." P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 53 (1983).

Petitioners suggest that all the other federal courts to address the subject disagree with the eleventh circuit's

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17. Petitioners argue that the cases cited by this Court for this proposition in *Chappell* were not civil damage lawsuits, but habeas corpus or injunction cases, and therefore civil lawsuits for damages are still prohibited per se. Petitioners fail to explain how habeas corpus or injunction cases are any less disruptive or intrusive, or why they may not also involve second-guessing military decision-making. This is not a logical distinction. The nature of the relief sought is not nearly as important as the potential impact of the case on the military disciplinary structure, and that depends on the facts of the case.

interpretation of *Chappell* in this case, and they all find instead that *Chappell* imposes a per se prohibition against *Bivens* actions brought by servicemen regardless of whether the facts involved will impact on military discipline. In truth, the circuit courts are in conflict on the interpretation of *Chappell*, but the majority agree with the eleventh circuit.

The third circuit does appear to disagree with the eleventh circuit below, and to take instead a "per se prohibition" interpretation of *Chappell*. *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986). (It should be noted, however, that *Jorden* was a 2-1 decision and it involved facts almost identical to *Chappell* which could not be distinguished even if there had been a factual inquiry.) The third circuit is the only circuit we have found to be in conflict with the eleventh circuit on this point.[18]

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18. Petitioners also cite *Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985) and *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984) as examples of cases that reject the eleventh circuit's interpretation of *Chappell* and hold *Chappell* to require a per se prohibition despite the nature of the conduct and whether the suit would impact on military discipline. Neither of those cases say any such thing. The plaintiffs in those cases were simply precluded because their claims were essentially identical to the claims in the *Chappell* case. Those cases did not discuss the issue involved in this case.

Petitioners also rely on *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983), however the ninth circuit has since then taken a different view of *Chappell* and *Feres* and is now in the same camp as the eleventh circuit in this case. See *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 929 (9th Cir. 1983); *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986).

Petitioners also cite *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983) however that case is much different and was even distinguished by the district judge in this case. (Pet. App. 32a-33a). The plaintiff here was not acting pursuant to direct orders, unlike the nuclear testing cases such as *Gaspard*. As the eleventh circuit below noted, "Because he was surreptitiously administered the drug, Stanley could not possibly have challenged

(Continued on following page)

While the third circuit disagrees with the eleventh circuit in this case, the eighth circuit and the ninth circuit now take the same flexible approach used in this case and expressly reject the "per se prohibition" interpretation of both *Chappell* and *Feres*. See *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied 105 S.Ct. 3524; *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986). See also *Shaw v. Gwatney*, 584 F.Supp. 1357, 1362 (E.D. Ark. 1984).

In *Brown, supra*, the eighth circuit applied this court's language in *Chappell* and went on to analyze whether the rationale of the *Feres* doctrine would be fulfilled by applying it to the facts before the court. The court concluded that the case presented such a "unique factual situation" that the plaintiff should be able to sue the defendants individually even though an FTCA claim could not be prosecuted under the *Feres* doctrine.[19]

The present case involves facts even more unique than *Brown, supra*. This case does not involve or threaten to compromise military discipline, nor the "special nature of military life." A case like this could easily involve a civilian as much as a military serviceman (and in fact

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Footnote continued—

his 'orders' to drink the clear substance. 'The inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case." (Pet. App. 12a). The court in *Gaspard* expressly stated that "it is crystal clear that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102. See also *Gaspard, supra* at 1105, n. 17.

19. *Brown* was actually a civil rights action but even petitioners maintain in their brief (at footnote 17) that *Bivens* actions against federal officers should be treated the same as civil rights actions against state officers in applying the *Chappell* immunity. We agree with that. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, n. 30 (1982).

such covert drug testing did include civilians, according to the testimony at Senate hearings).

A trial in this case would not involve second-guessing of any military orders directed to this Plaintiff, since he was under no orders. The petitioners argue it could ultimately involve an inquiry into higher echelon military decision-making. (This assumes there were military decisions involved in this case. See footnote 14, *supra*.) However, if that was the standard for prohibiting a *Bivens* action in any case, no matter what kind of wrongful act may be perpetrated on a serviceman, the defendants could always remain immune by asserting their act was a result of "military decision-making."

The public interest in protecting decision-making processes varies with the type of decision or function involved. For example, a strategic or tactical decision during wartime may be entitled to the utmost protection from judicial intrusion,[20] whereas a decision to test the usefulness of LSD for interrogations deserves less protection. The circumstances of this case do not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review.

Petitioners argue (at page 26, n. 18 in their brief) that "national survival in war may depend on unquestioning obedience to military orders." However, there is a specific FTCA exception for "combatant activities" during time of war, which should certainly be a paramount special factor counseling hesitation in a *Bivens* action. That concern is not implicated at all by the facts of this case.

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20. See, for example, FTCA exceptions to governmental liability for "discretionary functions" or "combatant activities." 28 USC §§2680 (a) and (j).

The public interest in maintaining in the armed forces soldiers who are blindly obedient to orders also has its limits. Compare the dictum in *Chappell v. Wallace*, 462 U.S. at 300 ("habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection") with *United States v. William Calley*, 22 C.M.A. 534, 541, 48 C.M.R. 19, 26 (1973) ("The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person.") Military law imposes an obligation on soldiers to refuse to obey unlawful orders, a duty quite inconsistent with unthinking obedience. Soldiers are subject to criminal sanctions for obeying orders to commit war crimes. *United States v. Calley, supra; United States v. Kinder*, 14 C.M.R. 742, 770-773 (1953).

The acceptance of the "per se immunity" rule argued for by petitioners under the type of facts in this case would be tantamount to admitting that because of Plaintiff's military status, federal officers can willfully and knowingly violate his constitutional rights without fear of accountability in the civil justice system. Would such a rule promote discipline in the military or encourage corruption? What would be the effect on morale and discipline if the judiciary countenanced (by ignoring) such patent illegality? To deny Plaintiff civil redress under these circumstances would do more to undermine military discipline than to permit recovery. The existence of a civil damages remedy for the type of conduct involved in this case would actually promote discipline since soldiers could be more confident that obeying orders would not result in undetected harm to them, such as ingestion of LSD.

This Court has held that even a convicted and incarcerated federal prisoner may bring a *Bivens* action against

prison officials for violation of constitutional rights, under compelling circumstances. *Carlson v. Green*, 446 U.S. 14 (1980). Likewise for an FTCA action alleging negligence of prison officials. *United States v. Muniz, supra.* If the disciplinary structure within our prisons is not so overwhelming under all circumstances to preclude a civil lawsuit, should it be so in the military? By arguing for a "per se" prohibition against allowing a *Bivens* action for this case, the government is actually saying that an army master sergeant like Mr. Stanley should be relegated to a position inferior to that of a convicted and incarcerated federal prisoner. What kind of rational policy can justify such an anomalous result?

Finally, the petitioners discuss, in general terms, the possibility of veterans benefits that may be available to plaintiff. The petitioners fail to specify what particular VA regulation covers this type of claim and compensates for the type of injury that has been suffered here. Plaintiff alleges he has been deprived of his constitutional right to privacy of his mind and body, his right of bodily integrity and the right to control his own behavior and intellectual thought processes, he has suffered mental anguish, the disruption and termination of his promising army career, permanent psychological injuries, and worst of all the disruption, breakdown and dissolution of his marriage and family life. (J.A. 7-8). There are no veterans benefits to compensate for such injuries, nor would veterans benefits serve the important deterrent purpose behind a *Bivens* action to discourage such shocking conduct and abuse of power by civilian officers and agents of the federal government. The nature of the acts involved in this case deserve to be affirmatively deterred.

The petitioner's intentional withholding of the true facts until eighteen years after the fact and for almost

seven years after plaintiff's retirement from the army has also substantially prejudiced his ability to satisfy the V.A. regulations requiring an applicant to show "service connection" by evidence that a chronic disease (including psychoses) became manifest during the period of active service or within one year after discharge from service, soon followed by a "definite diagnosis." 38 C.F.R. §§3.307, 3.309. The Army Claims Service found "no causal connection has been shown between the administration of LSD and the conditions alleged by the claimant in his claim." (R. 761). Mr. Stanley needs legal representation to assist him in demonstrating the necessary causal connection. The VA's authority to p y (and the restriction on attorneys to accept) no more than ten dollars for attorney's fees on a VA claim serves to discourage needed legal representation for many VA claimants. See 38 USC §3404-05 (1982); *Walters v. Nat'l Ass'n of Radiation Survivors*, ... U.S. ....., 105 S.Ct. 3180 (1985).

Bivens and its progeny suggest a role for the courts in vindicating constitutional violations to deter unconstitutional tortious conduct where Congress has not created adequate remedial alternatives. The petitioners argue that there does not have to be "adequate" administrative compensation available, so long as Congress has shown some "activity in the field," which by itself creates a "special factor" that militates against allowing a *Bivens* action. That is not what *Chappell* stands for, since the intra-service alternative remedy in *Chappell* was found to be adequate. Also, other "special factors" existed in *Chappell* which do not exist in this case.

The problem with the petitioner's interpretation of *Chappell* is that it sweeps too many qualitatively distinct tort claims under its bar, without regard for the actual

adequacy of intra-military remedies to resolve a particular claim. Unless this Court intended in *Chappell, supra*, to silently modify the rule in *Carlson v. Green*, 446 U.S. 14 (1980), there must be a showing that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution, before this will automatically preclude a *Bivens* action. *Carlson, supra* at 446 U.S. 19-20. The alternative remedial scheme must be equally as effective as the damages action. *Id.* at 446 U.S. 18-19. Unless this Court intended in *Chappell* to silently modify its holding in *Bush v. Lucas*, 462 U.S. 367 (1983) (which was decided on the same day as *Chappel*), there must be an alternative remedy to a *Bivens* action which, although not equally as effective, at least "provides meaningful remedies" before it rises to the dignity of being a "special factor."[21] Mere "activity in the field" by Congress is just one factor that goes into the equation, but it is not by itself overriding.

This one factor (Congress' activity in the field) was not "ignored" by the eleventh circuit below, as petitioners argue (at pp. 31, n. 23, 6-7). The eleventh circuit expressly considered it but concluded "that this factor also does not militate against permitting Stanley's *Bivens* claim." (Pet. App. 12a). If the intra-service remedy provides essen-

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21. *Bush v. Lucas*, at 385-386. This Court noted that the plaintiff's constitutional claims were "fully cognizable" within the elaborate and comprehensive civil service remedies available to the plaintiff in *Bush*. As stated by Justices Marshall and Blackmun in their concurring opinion, ". . . a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation . . . and that affords a remedy that is substantially as effective as a damages action." *Id.* at 390. In that case, as in *Chappell*, this Court's decision was based on the implicit finding that the alternative remedial scheme was at least adequate and provided meaningful remedies (if not equally as effective as a *Bivens* action) before it would constitute a substantial "special factor" counseling hesitation in allowing a *Bivens* remedy.

tially no compensation for the type of harm done to a serviceman (as in this case), then it does not amount to a very weighty "special factor" militating against allowance of a *Bivens* claim.

No-fault recovery under the Veterans Benefits Act does not infer an absolute license to inflict harm on military servicemen. There are normative limits to the circumstances under which the government may inflict injuries on its military personnel. VA benefits should not be considered the exclusive remedy for this plaintiff. The Veterans Benefits Act expressly recognizes the potential of duplicate benefits recovered under the FTCA, and provides a method of off-setting cumulative recoveries. 38 USC §351; *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). There is no basis for reading into the Veterans Benefits Act an exclusive remedy provision which Congress left out.

The eleventh circuit did *not* hold that *Chappell* is limited only to cases involving the Code of Military Justice as an alternative compensation scheme. The argument of the petitioners to that effect (at page 31) is misdirected. The eleventh circuit simply noted that the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* [the Board for the Correction of Naval Records and the Uniform Code of Military Justice] are clearly inadequate to compensate Stanley for the violations complained of here." (Pet. App. 12a-13a).

The eleventh circuit was correct on this point. The administrative remedies which would have fully compensated the plaintiffs in *Chappell* for the type of wrong inflicted in that case (retroactive back pay and promotions, and correction of naval records) would be meaningless to

Mr. Stanley in the present case. Such remedies cannot correct the constitutional wrong done to Mr. Stanley since, unlike *Chappell,* he is not just claiming the army cheated him out of money, or a promotion, or put unfair performance evaluations in his records.

The individual defendants are entitled, of course, to raise a *qualified* immunity defense if they acted in good faith (although that has not yet been pleaded). *Butz v. Economou,* 438 U.S. 478 (1978). However, they have the burden of pleading this as an affirmative defense and proving that they reasonably believed their conduct to be lawful. *Gomez v. Toledo,* 446 U.S. 635 (1980).

Since plaintiff in this case is suing civilian federal executive department officials rather than superior military officers within the normal chain of command, this case is more akin to this Court's holding in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) than to *Chappell, supra.*

Harlow involved a *Bivens* action for damages brought by a former employee of the Department of the Air Force against certain federal executive department officials who allegedly conspired to fire him by eliminating his position with the air force in retaliation for his testimony during a congressional investigation. The defendants asserted that their action was taken "to promote economy and efficiency in the Armed Forces."[22] On that basis the civilian federal officials sought absolute immunity from liability for their alleged unconstitutional conduct. However, this Court held that under a "functional" approach to immunity law, the immunity of the government officials extends no further than its justification warrants and unless the conduct involved embraces a function so sensitive as to re-

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22. See companion case, *Nixon v. Fitzgerald,* 457 U.S. 731, 734 (1982); and *Harlow, supra* at 805.

quire a total shield from liability, then the federal officers are entitled only to a qualified or "good faith" immunity. This Court held that federal officials seeking absolute immunity from liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. *Id.* at 808. The qualified immunity would be defeated if the federal official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." *Id.* at 815.

This "functional approach to immunity law" was the same type of reasoning employed by the eleventh circuit below in this case. This case does not involve the "typical *Feres* factual paradigm" and therefore warrants a factual inquiry to determine whether the suit is of such a nature that it would undermine military discipline, or involve the courts in sensitive military affairs, or otherwise implicate the concerns which underlie the *Feres* doctrine. That analysis is not in conflict with *Chappell*. In fact, it is the same analysis which this Court made in *Chappell* under the facts of that case which, unlike this case, was a classical example of the typical *Feres* factual paradigm.

This case may be an appropriate vehicle for this Court to clarify the meaning of its decision in *Chappell*, which has caused some confusion and disagreement among the circuit courts of appeals.

CONCLUSION

This Court should decline the Petitioners' request to expand the *Feres* doctrine and the holding in *Chappell* to embrace the entirely different circumstances presented in this case. The judgment of the court of appeals in this case should be affirmed.

Respectfully submitted,

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